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Lopez v. Vanbeek Herd Partnership Respondent's Brief Dckt. 44160

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant-Appellant/
Cross-Respondents,

v.

VANBEEK HERD PARTNERSHIP,

Employer,

and

STATE INSURANCE FUND,

Surety,
Defendants-Respondents.

SUPREME COURT NO: 44160

I.C. No. 2011-020952

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DEFENDANTS-RESPONDENTS' REPLY BRIEF

Appeal from the Industrial
Commission of the State of Idaho

Chairman R.D. Maynard Presiding

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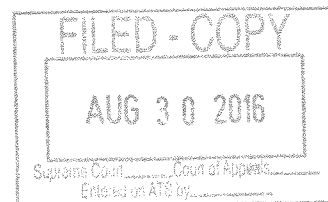


TABLE OF CONTENTS

I.	STATE OF THE CASE.....	1
II.	ADDITIONAL ISSUES PRESENTED ON APPEAL.....	2
III.	ARGUMENT.....	2
	A. Standard of Review.....	2
	B. Non-Total Loss of Hearing is Not Governed by the Provisions of Idaho Code §72-428.....	3
	C. The Rating Determined by the Industrial Commission is Supported by Substantial and Competent Evidence	9
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Burke v. EG&G/Morrison Knudsen Construction Co.</i> , 126 Idaho 413, 885 P.2d 372(1994).....	8, 9, 10
<i>Daleiden v. Jefferson County, Joint School District No. 251</i> , 139 Idaho 466, 468, 80 P.3d 1067 1069 (2003).....	2
<i>Drake v. State Industrial Special Indemnity Fund</i> , 128 Idaho 880, 881, 920 P.2d 397, 398 (1996).....	3
In re permit no. 36-7200, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992)	4
<i>Mayer v. TPC Holdings, Inc.</i> _____ Idaho _____, 370 P.3d 738, 741 (2016).....	4
<i>McLean v. Maverick Country Stores Inc.</i> , 142 Idaho 810, 813, 135 P.3d 756, 759 (2006)	4, 6
<i>Robison v. Bateman – Hall</i> , 139 Idaho 207, 210, 76 P.3d 951	4
<i>State v. Yzaguirre</i> 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007)	4
<i>Urry v. Walker & Fox Masonry Contractors</i> , 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989)	3, 7, 8, 9, 10
<i>Vargas v. Keegan, Inc.</i> , 134 Idaho 125, 128, 997 P.2d 586, 589 (2000).....	3
<i>Waters v. All Phase Construction</i> , 156 Idaho 259, 262, 322 P.3d 992, 995(2014)	3

Statutes

Idaho Code §72-407.....	5
Idaho Code §72-428	3, 4, 5, 6, 7, 8
Idaho Code §72-428(3)	5, 8, 9, 10
Idaho Code §72-429.....	6, 7
Idaho Code §72-430	6, 7, 8, 9
Idaho Code §72-430(2)	5, 7

Other Authorities

AMA Guides (Sixth Ed.)	3, 5, 7, 8, 9
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I. STATEMENT OF THE CASE

Defendants/Respondents Van Beek Herd Partnership, Employer, and State Insurance Fund, Surety (hereinafter together “Employer”), generally agree with the statement of the case set out by Claimant/Appellant Enrique Lopez (“Lopez”). He overlooked the following facts:

Dr. A. Joseph Seitz, AuD, provided a rating for Lopez' hearing loss, using the “AAOO” formula. Hearing Exh. e, p. 32. Dr. Seitz noted that he was “not qualified nor trained to provide a whole man impairment.” *Id.* at p. 31.

Clinical audiologist Christine Pickup, AuD, was asked by Lopez' attorney to provide her opinion as to “What if any audiologic injuries did Enrique experience as a direct result of the subject August 26, 2011 industrial accident?” She responded:

Mr. Lopez experienced irreversible sensorineural hearing impairment in the right ear along with concomitant tinnitus.

Hearing Exh. g, p. 36. She provided an impairment rating dealing only with the right ear for a 100% impairment of his “monaural hearing loss” pursuant to the Sixth Edition of the AMA Guides to Permanent Impairment. *Id.* at p. 37.

The Industrial Commission did not adopt the Referee's recommended Decision essentially for one reason. The Referee noted that Dr. Delray Maughan stated that “the left ear high-frequency neurosensory hearing loss might or might not be related to the head injury. Without a preinjury audiogram I cannot exclude the head injury as the cause of the left ear loss, even though the pattern is consistent with a pre-existing noise induced high frequency hearing loss.” Hearing Exh. h, p. 38. The Referee concluded that this statement was sufficient to prove that the left ear condition was causally related to the accident. R, p. 14. The Commission disagreed with that conclusion. *Id.* at p. 31. Instead, the Commission concluded that Dr. Seitz

provided the necessary opinion establishing a link between the accident and the left ear condition, even though Dr. Seitz' conclusion was only that Claimant "has suffered a profound hearing loss in the right ear as a result of head trauma, which occurred in August of 2011." Hearing Exh. e, p. 28¹.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

The Employer suggests that the appropriate issues on appeal are:

- (1) Whether the Industrial Commission used the proper methodology for calculating Lopez' income benefits for the non-total loss of binaural hearing?
- (2) Whether the Industrial Commission properly exercised its discretion in calculating the income benefits due Lopez?

III. ARGUMENT

A. Standard of Review.

This determination of the first issue requires a consideration of the workers compensation statute and is therefore a pure question of law, over which this Court exercises de novo review. The interpretation of a "legislative act, such as the workers' compensation statutes, presents a pure question of law." *Daleiden v. Jefferson County Jt. Sch. Dist. No. 251*, 139 Idaho 466, 468, 80 P.3d 1067, 1069 (2003). The second issue, however, involves this Court's review of a discretionary decision of the Idaho Industrial Commission, the agency entrusted by the legislature with the responsibility of making such income benefits decisions. Accordingly, this Court reviews such decisions under the abuse of discretion standard. "The Supreme Court reviews factual findings made by the Industrial Commission to determine if they are supported

¹ While no medical provider or expert opined that to any degree of medical probability the left ear hearing loss was caused by the accident as compared to a pre-existing noise-induced high frequency hearing loss, Defendants have not appealed that determination and are willing to accept and have paid the 8% percent income benefits as determined by the Industrial Commission.

by substantial and competent evidence” *Drake v. State Industrial Special Indemnity Fund*, 128 Idaho 880, 881, 920 P.2d 397, 398 (1996).

B. Non-Total Loss of Hearing is Not Governed by the Provisions of Idaho Code §72-428.

The Idaho Industrial Commission found that Lopez lost his hearing in one ear and possibly a small amount of hearing in his other ear as a result of an industrial accident. The Industrial Commission determined that a non-total hearing loss does not come within the scheduled income benefits set out in Idaho Code § 72–428 as the statute unambiguously provides scheduled benefits only for the total loss of binaural hearing. This interpretation of the statute is correct.

Idaho Code §72–428 is a provision of the Idaho worker's compensation law mandating certain scheduled income benefits for losses of use of specific body parts. If a claimant's injury fits within the scheduled benefits, then the Industrial Commission is required to utilize that schedule. If not, the Commission is the ultimate arbiter of impairment and generally uses the most recent American Medical Association Guides to the Evaluation of Permanent Impairment as informed by medical evidence. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989); *Vargas v. Keegan, Inc.*, 134 Idaho 125, 128, 997 P.2d 586, 589 (2000); *Waters v. All Phase Construction*, 156 Idaho 259, 262, 322 P.3d 992, 995(2014).

Idaho Code §72–428 provides in part:

**SECTION 72-428. SCHEDULED INCOME BENEFITS FOR
LOSS OR LOSS OF USE OF BODILY MEMBERS.**

An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five (55%) of the average

weekly state wage stated against the following scheduled permanent impairments respectively:

...

(3) Loss of vision and hearing

Total loss of vision of one eye..... 150

Loss of one eye by enucleation 175

Total loss of binaural hearing 175

(3) Total loss of use. Income benefits payable for permanent disability attributable to permanent total loss of use of [or] comparable total loss of use of a member shall not be less than ask for the loss of the member.

(5) Partial loss or partial loss of use. Income benefits payable for permanent partial disability attributable to permanent partial loss or loss of use, of a member shall not be less than for a period as the permanent impairment attributable to the partial loss or loss of use of the member bears to total loss of the member.

As this Court has recently stated:

The objective of statutory interpretation is to give effect to legislative intent. *Robison v. Bateman – Hall*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because “the best guide to legislative intent is the words of the statute itself,” the interpretation of the statute must begin with the literal words of the statute. *In re permit No. 36-7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992); *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Where the statutory language is unambiguous, “this Court does not construe it, but simply follows the law as written.” *McLean*, 142 Idaho at 813, 135 P.3d at 759. “Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute.” *State v. Yzaguirre*, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007).

Mayer v. TPC Holdings, Inc., _____ Idaho _____, 370 P.3d 738, 741 (2016).

Section 72-428 specifies scheduled impairments for “total loss of vision of one eye” and “total loss of binaural hearing.” Thus the Idaho legislature specified scheduled income benefits

for a particular impairment for a total loss of vision of one eye yet provided for a scheduled impairment for loss of the hearing only when it was a total loss of binaural hearing².

As the Idaho Industrial Commission noted below, the workers compensation act recognizes a “substantial difference between partial and total loss of a sensory function.” R, p. 36. This analysis is reinforced by the explanation in the AMA Guides (Sixth Ed.) regarding hearing loss. Table 11 (p. 254) deals with binaural hearing loss and agrees with the Idaho scheduled impairments that binaural total loss of hearing is equivalent to 35% impairment (or 175 weeks as specified in §72–428). The AMA Guides clearly differentiates total binaural hearing loss from monaural hearing impairment and partial binaural hearing loss, which is a lesser magnitude loss. Functional loss of hearing in one ear is not worth 50% of complete hearing loss as Lopez argues. This is particularly true when considering partial loss of hearing as compared to total loss of hearing.

If the legislature had wanted to prescribe a scheduled impairment rating for partial loss of binaural hearing or total loss of hearing in one ear, it knew how to do so as illustrated by the fact that it did provide a scheduled impairment for the loss of vision in one eye. It did not choose to prescribe an impairment rating for total loss of hearing in one ear or partial loss of binaural hearing.

This is made incontrovertibly clear by Idaho Code §72–430(2). That provision states:

(2) Preparation Of Schedules – Availability For Inspection –
Prima facie evidence. The commission may prepare, adopt and
from time to time amend a schedule for the determination of the

² The legislature had already dealt with the loss of sight in both eyes in Idaho Code §72-407 where it stated that total loss of sight in both eyes is deemed to render the claimant totally and permanently disabled. It is interesting that it did not schedule the total loss of vision of one eye for 250 weeks, or one half of the 500 weeks generally used to measure total disability. Thus, while loss of vision in both eyes is presumptively deemed 100% total and permanent disability under §72-407(1), total loss of vision in only one eye equates to 30% permanent partial impairment under §72-428(3).

percentages of unscheduled permanent injuries less than total, including, but not limited to, a schedule for partial loss of binaural hearing and for loss of teeth, and methods for determination thereof. (Emphasis added).

That provision makes absolutely clear that partial loss of binaural hearing, as is the condition in the present case, is not governed by §72–428, but rather it is within the discretion and purview of the Industrial Commission to determine income benefits for such condition. Moreover, that Section reinforces the fact that it is the Industrial Commission that decides the “methods for determination” of the percentages of unscheduled permanent injuries such as the partial loss of binaural hearing.

The objective of statutory interpretation is to give effect to legislative intent based on the unambiguous words of the statute. The Idaho workers compensation statute provides that binaural loss of hearing is not a scheduled permanent impairment for which income benefits have been specified in §72–428 but rather is an unscheduled permanent injury.

Just as importantly, §72–430 provides that the Idaho Industrial Commission has the discretion to establish the “methods for determination” of unscheduled permanent injuries less than total. If the legislature intended that the Commission would be bound by some “application of straightforward mathematical calculations to an explicitly named permanent injury, i.e. partial loss of binaural hearing,” as Lopez argues in his Opening Brief at 6, then the Legislature would not have stated in §72–430 that the Commission has the right and discretion to decide the “methods for determination” of unscheduled permanent injuries less than total, including partial loss of binaural hearing. Where statutory language is unambiguous, “this Court does not construe it, but simply follows the law as written.” *McLean v. Maverick Country Stores Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006).

If the workers compensation statute mandated the comparative assessment of partial loss impairments by some mathematical comparison to the scheduled impairments, the legislature would not have used the language it used in §72–430.

Lopez mentions Idaho Code §72-429 and subsection 5 of Idaho Code §72–428 as somehow supporting his argument. Section 72–429 does not apply because that Section does not address loss of use, or partial loss of use, but only “loss of the members.” Partial loss of binaural hearing is a partial loss of use, not a loss of a member. Subsection 5 of §72–428 merely states that income benefits for the permanent partial disability shall not be less than the “scheduled permanent impairments” set out in Sections 1 through 3 of the Code section. Subsection 5 of §72–428 and §72-429 do not mandate the comparative assessment of partial loss impairments that Lopez urges for his partial loss of binaural hearing.

The Court need go no further as the statutes are clear that Lopez's argument that some Code section or combination thereof requires the Commission to apply a “fixed mathematical calculation” derived from the total loss scheduled mandates of §72–428 is invalid, because the clear language of those statutes and more importantly the clear language of §72–430(2) expressly state the opposite. The legislature has given the Industrial Commission the right and discretion to select appropriate methodology to determine the percentage of unscheduled permanent injuries for partial loss of binaural hearing.

If, however, the Court considers applicable case law to illuminate the interplay of statutory language in the Act, that examination will reinforce the Industrial Commission's decision. First, the Employer recognizes, as did the Industrial Commission below, that the AMA Guides do not supersede statutory directive. If Lopez’s impairment were controlled by §72–428, it would not matter what medical opinion might decide or what the AMA Guides suggests would

be an appropriate rating. The Commission utilized the AMA Guides as an advisory tool, as it is permitted to do as illustrated by §72–430 of the Idaho Code pointing out that the Commission has the discretion to establish the methods for determination of unscheduled permanent injuries less than total.

Lopez cites *Urry v. Walker*, 115 Idaho 750, 769 P.2d 1122 (1989), as supporting his position. That case discussed that income benefits for impairments attributable to conditions that were not among the scheduled permanent impairments enumerated in §72-428 are to be determined by an analogizing process which is “sufficiently flexible.” That is, the Court recognized the Commission's discretion to recognize relevant attributes of the Claimant’s condition. Again, while this case dealt with loss of use of a member (which the present case is not dealing with), it does point out the Supreme Court's recognition that the Industrial Commission has the flexibility to determine appropriate income benefits. It flies in the face of the strict mathematical calculation demanded by Lopez.

Burke v. EG&G/Morrison Knudsen Construction Co., 126 Idaho 413, 885 P.2d 372(1994), definitively approves the Industrial Commission’s determination below. In *Burke*, an employee's eye was injured in an industrial accident and he had decreased vision even after implantation of an artificial lens. His ophthalmologist concluded that the claimant had a 50% loss of central vision efficiency. Rather than making a “mathematical calculation” based on the “total loss of vision of one eye” scheduled impairment of Idaho Code §72–428(3), as advocated by Lopez in the present case, “the Commission's determination of the degree of permanent impairment to Burke's left eye was based on opinions of both Burke’s ophthalmologist and of an ophthalmologist who reviewed Burke's records for MK’s surety, and on the Guides to the Evaluation of Permanent Impairment of the American Medical Association (the AMA Guides).”

Id. at 415, 885 P.2d at 374. The Supreme Court, in an opinion by Justice Byron Johnson, approved this methodology and the Commission's reliance on the expert evidence and the AMA Guides. In the present case, the Commission considered the opinions of a qualified expert, Dr. Delray Maughan, and also considered the AMA Guides in order to determine the income benefits due to Lopez. This is what Idaho Code §72-430 provides for; this is what the *Burke* case approved; this is what *Urry v. Walker* contemplated.

C. The Rating Determined by the Industrial Commission is Supported by Substantial and Competent Evidence.

The Commission, using the analogizing process approved in *Burke* and *Urry*, concluded that Lopez' income benefits should be calculated as follows: "22.9% overall binaural hearing loss sustained X 175 weeks= 40.075 weeks; 40.075 weeks ÷ 500 weeks = 8% permanent impairment of the whole person." R. p. 40. The Commission considered Dr. Maughan's conclusion that Lopez sustained a 22.9% binaural impairment. It utilized the 175 weeks as specified by Industrial Commission §72-428(3) for total binaural hearing loss. It used the 500 weeks specified by the Legislature to reach the overall benefits.

The Commission summarized its decision as follows:

The proper method for calculating Claimant's partial binaural hearing loss impairment is by analogizing his unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code §72- 428(3); specifically, by relying upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code §72 -428(3) for total binaural hearing loss.)

R. p. 41.

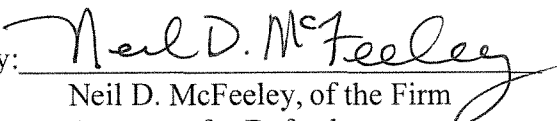
It therefore relied upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, which was provided by Dr. Maughan, and analogized this to the statutory schedule of Idaho Code §72-428(3), as specified by *Urry* and *Burke*. This method is proper and this result is supported by substantial and competent evidence. This is the proper decision as required by worker's compensation statute and this Court's case law interpreting that statute.

IV. CONCLUSION

Employer respectfully requests the Supreme Court to affirm the decision of the Idaho Industrial Commission and find that Mr. Lopez has an 8% permanent partial disability.

DATED this 30th day of August, 2016.

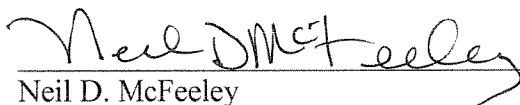
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of August 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

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